IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-257

October Term, 1977

LT. COL. JOSEPH B. BERGEN,

Petitioner,

VS.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONER

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The petitioner files this Reply Brief to the Memorandum for the United States in Opposition to the Petition for Writ of Certiorari to the Court of Claims filed in this case, pursuant to Supreme Court Rule 24(4), to address the argument first raised in the Memorandum in Opposition to this petition, contending that: " . . . the Air Force construes it *[Air Force Manual 35-3, Ch. 23, ¶23-5a* Note (Pet. App. B 34)] to apply to out-of-sequence promotions." as mandating that petitioner meet certain requirements for promotion such as filling a vacancy slotted for the higher rank and being recommended for promotion to Lieutenant Colonel by the Commander of the Unit having the vacancy (Pet. App. A 25-27) 30 days prior to meeting the relevant selection board. Footnote 3, p. 3 of the Memorandum for the United States.

In the first place, as pointed out in the Petition for Writ of Certiorari, and acknowledged by the Air Force, petitioner here was not required to meet an out-of-sequence selection board. Nevertheless, the Solicitor General now argues that this 30-day requirement does apply to out-of-sequence promotions so as to preclude petitioner from promotion, both because he was not filling this vacancy and did not have a recommendation for

promotion to Lieutenant Colonel 30 days prior to the meeting of the out-of-sequence selection board, which events must have occurred on or before May 20, 1969, since plaintiff could not have been informed of placement on the recommended list making him eligible for out-of-sequence promotions until on or shortly after June 2, 1969 (Pet. App. C 39).

The government now attempts to buttress its argument that petitioner must have met these requirements and that these requirements apply to out-of-sequence promotions — contrary to the contention of the petitioner — because under the ruling of *Udall v. Tallman*, 30 U.S. 1, 16; 13 L. Ed. 2d. 616; 85 S.Ct. 792, an agency construction of a regulation is binding on this court.

The relevant *Udall* discussions in this regard may be found beginning on p. 625, 13 L. Ed., where the court held: "When faced with a problem of statutory construction, this court shows great deference to the interpretation given the statute by the offices or agency charged with this administration." The court goes on to state: "The ultimate criterion is the administrative interpretation which becomes of controlling weight *unless it is patently erroneous or inconsistent with the regulation.*" Then the court continued on page 626, by stating: " . . . in determining the meaning of the statute or the existence of a power, weight shall be given *to the usage* itself . . . when the validity of the practice is the subject of investigation." Finally, the court states: " . . . that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it, is entitled to great respect and, *if acted on for a number of years,* it will not be disturbed except for cogent reasons." [Emphasis supplied].

Now, it must be noted that the Air Force failed to supply the Court of Claims with any "construction" of *Air Force Manual 35-3* adverse to petitioner's construction. The only affidavit supplied by the Air Force was the affidavit of Mr. Neal Hartman dated December 2, 1974, (Pet. App. D 40) that supports petitioner's construction [which indeed caused the government to have petitioner's claim reconsidered by the Board of Correction of Military Records when this case first came before the Court of Claims] stating if an individual was on a previous list, he would have been promoted *"automatically" "without going before the board."* (Emphasis supplied]. The government only argued its contrary construction of this *Manual* based on its lawyers' interpretation and the Court of Claims decision interpreted the *Manual* without a construction by the agency. The Air Force through its Secretary or other authorized official has not construed this *Manual* in the manner that was done in the *Udall* case (p. 626). The petitioner, however, filed an affidavit, that was not refuted (Pet. App. D 46), sworn to by Master Sergeant Prince Tucker, Jr., on December 3, 1976, outlining in detail the construction given by the Air Force to the *Manual* controlling out-of-sequence promotions for reserve officers filling Mobilization Augmentation Grade Vacancies (M-Day Assignees). This affidavit clearly supports the petitioner's construction of this *Manual* that this recommendation need not have been made.

This *Tucker* affidavit clearly shows that the construction given this *Manual* as to the petitioner not needing a recommendation for an out-of-sequence promotion is consistent with the "usage" of the Air Force "acted on for a number of years", and that any administrative interpretation to the contrary would be "patently erroneous" or "inconsistent" with the *Manual* [Regulation], as pointed out in the Petition for Certiorari.

Furthermore, it has been pointed out and emphasized again here that had the petitioner been notified that he was on the recommended list for promotion to Lieutenant Colonel on or about June 2, 1969, he would have immediately filled the vacancy slotted for the higher rank at Homestead Air Force Base, thereby making him eligible for out-of-sequence promotion without a recommendation for promotion to Lieutenant Colonel, the rank to which he was already selected for promotion by a previous overall vacancy board.

As to the second contention in the Memorandum of the government, the *Testan* case (424 U.S. 392) does apply [as counsel for the government so orally argued before the Court of Claims] since the petitioner did not have to meet the requirements the government argues he must have met for promotion in time to be promoted by July 1, 1969. The refusal of the Air Force Board to correct this error was "legal error." Therefore, the Court of Claims should have availed itself of the occasion to consider whether any delay in informing petitioner violated Air Force Regulations or otherwise infringed upon petitioner's substantive rights and whether there was "legal error" by the Air Force in not informing petitioner immediately of his placement on the recommended list as of June 2, 1969, as required by the *Manual.*

For the foregoing reasons and for the reasons set forth in the petition, it is again respectfully submitted that the Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Reply Brief were on this date served on respondent's counsel of record, whose identity and address are as follows:

Honorable Wade H. McCree, Jr.,
Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530,

by placing said copies in an authorized depository for mail in a properly addressed envelope with sufficient prepaid postage thereon to insure first class airmail delivery.

This _____ day of October, 1977.

Attorney for Petitioner